WORKERS' COMPENSATION APPEALS TRIBUNAL

PRACTICE MANUAL

MAY, 2005

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1.00 THE WORKERS' COMPENSATION APPEALS TRIBUNAL (TRIBUNAL)

1.10 Introduction

Section 240(1) of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "*Act*"] gives the Tribunal the authority to determine its own procedures and to make rules governing the hearing of appeals.

This manual contains rules, practices and procedures established by the Tribunal and may be cited as the Practice Manual. It is a codification of the current procedures of the Tribunal and is designed as a reference tool for both the Tribunal and participants that appear before it. The purpose of the Practice Manual is to ensure fairness, predictability, consistency, transparency and efficiency in all of the functions conducted by the Tribunal. Where there is a conflict between the Practice Manual and the *Act*, the *Act* prevails.

Reference in the Practice Manual to an appeal may include other proceedings such as an application under s.29 of the *Act*.

Statements based on specific provisions of the *Act* are generally followed by the relevant statutory reference. The rules, practices and procedures of the Tribunal are subject to review and amendment as the Tribunal considers necessary. A current copy of the Practice Manual will be accessible on the Tribunal's Internet Website at: www.gov.ns.ca/wcat/.

1.11 Definitions

For the purpose of the Practice Manual,

"appeal commissioner" means a member of the Tribunal appointed pursuant to s. 238(3)(b);

"Board" means the Workers' Compensation Board;

"Chief Appeal Commissioner" means the member of the Tribunal appointed as Chief Appeal Commissioner pursuant to s. 238(3)(a);

"panel chair" means an appeal commissioner who coordinates the hearing of an appeal by a panel of three appeal commissioners;

"presiding appeal commissioner" means an appeal commissioner assigned by the Chief Appeal Commissioner to hear an appeal;

"Registrar" means an appeal commissioner performing the duties of Registrar;

"Tribunal" means the Workers' Compensation Appeals Tribunal established under s.238(1).

1.20 Role of the Tribunal

The Tribunal is established under s.238(1) of the *Act*. It is an appeal body independent of the Workers' Compensation Board, governed by Part II of the *Act*.

2.00 JURISDICTION

2.10 General

Appeals under s. 243-- Any person entitled to be a participant before a Board hearing officer can appeal the decision of the hearing officer to the Tribunal [243(1)]. Only a final decision of a hearing officer, one that disposes of an appeal and is communicated in writing, can be appealed to the Tribunal.

Applications under s. 29-- The Tribunal has the exclusive jurisdiction to determine if an injured worker can sue an employer. Any party to an action may apply to the Chief Appeal Commissioner for a determination of whether or not the right of action is barred. An appeal from the Tribunal's determination can be brought to the Court of Appeal if the Tribunal is alleged to have made a jurisdictional error.

2.11 Authority

The Tribunal may confirm, vary or reverse the decision of a hearing officer [252(1)]. However, the Tribunal cannot reconsider, rescind, alter, amend or make any further order in regard to any decision that it has already rendered [252(2)]. The Tribunal has the power to correct a typographical or clerical error made in a decision that has been rendered [252(3)].

2.12 Expert Evidence

The Tribunal may obtain expert evidence on any matter raised by an appeal [s.254].

2.13 Referrals to the Hearing Officer

The Tribunal may refer an appeal back to the hearing officer who rendered the decision, or to another hearing officer, when there is new or additional evidence or other reasons that merit the referral back to the hearing officer. The hearing officer must then reconsider the decision that has been appealed to the Tribunal [s. 251(1)].

2.14 Referral to the Chair

If the Chief Appeal Commissioner or a presiding appeal commissioner believes that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors, then the appeal can be referred to the Chair of the Board of Directors. The appeal before the Tribunal is then postponed or adjourned while the appeal is reviewed by the Board of Directors. The Tribunal may make an interim award while the appeal is postponed or adjourned [s.247].

When the Tribunal refers an appeal to the Chair of the Board under s. 247(1) of the *Act*, the Board of Directors may adopt a policy pursuant to s. 183 of the *Act* [s. 249(1)]. A policy is effective immediately and is applicable to all appeals before the Tribunal, including any appeals adjourned as a result of the referral to the Chair of the Board of Directors [s. 249(2)(b)].

2.15 Stated Case

Both the Board and the Tribunal may state a case in writing for the Nova Scotia Court of Appeal on any question of law. This can be done at any time and does not have to arise in the course of deciding an appeal brought before the Tribunal [s. 206(1)].

2.16 Federally Regulated Workers

Section 4 of the *Government Employees Compensation Act* (GECA) provides that employees of the Government of Canada and most federal crown corporations and entities receive compensation under the provisions of the workers' compensation legislation in place in the province where they are working. In Nova Scotia, federally regulated workers and their employers have the same appeal rights as provincially regulated workers and their employers.

2.20 Regulations

The Board, with the approval of the Governor in Council, may make any regulation required to carry out the provisions of Part 1 of the *Act* [s. 184(1)]. The Tribunal must decide an appeal according to the provisions of the *Act* and the Regulations [s. 246(1)] and in addition, may, with the approval of the Governor in Council, make any regulations required to properly carry out the duties of the Tribunal as prescribed by Part II of the *Act* [s. 255].

The Tribunal has regulation-making power in s. 255A(1) to make any regulation, with the approval of the Governor in Council, required to establish and implement an alternative dispute-resolution procedure to deal with appeals.

2.30 Policies of the Workers' Compensation Board

Section183(1) defines "policy" as a written statement adopted by the Board of Directors and designated by the Board of Directors as a statement of policy. The Board of Directors has the power to adopt policies consistent with Part 1 of the *Act* and the regulations made to implement Part 1 of the *Act*. Once a policy has been adopted, it is binding on every officer and employee of the Board and also on the Tribunal [s. 183(5)].

However, a policy is only binding on the Tribunal if it is consistent with Part 1 of the *Act* and the regulations [s. 183(5A)]. The Tribunal may interpret the policy and may refuse to apply a policy on the grounds that it is inconsistent with the *Act* or the regulations [s. 183(7)]. If, at any point in deciding an appeal, the Tribunal determines that a policy may not be consistent with the *Act* or regulations, the presiding appeal commissioner(s) will notify all participants and provide an opportunity for comment on the validity of the policy.

3.00 INITIATING THE APPEAL OR APPLICATION

3.10 Who May Appeal

Any person entitled to be a participant before the hearing officer can appeal the hearing officer's decision to the Tribunal. When the hearing officer's decision deals with benefit entitlement, the worker, or the worker's employer may appeal to the Tribunal. When the decision deals with employer assessments, the employer may appeal.

3.11 Other Participants

Section 245(1)(c) makes the Board a participant in appeals before the Tribunal. In addition, the Tribunal can add any other person who has a direct and immediate interest in the matter [s. 245(1)(d)]. The Attorney General of Nova Scotia and the Attorney General of Canada may also be added as participants if the appeal deals with constitutional questions or charter arguments.

3.12 Deceased Worker

A deceased worker's dependent spouse, other dependents, or employer, may bring an appeal regarding death benefits or survivor benefits [s.60(1)].

The estate of a deceased worker has the right to initiate or continue an appeal on behalf of a deceased worker, concerning compensation up to the date of the worker's death, and has the right to seek death benefits.

3.13 Corporations

If the employer is a corporation and the Board collects assessments from a director of the

corporation, the director may bring an appeal to the Tribunal. Both contractors and sub-contractors who are deemed liable for assessments levied against an employer, may bring an appeal to the Tribunal.

3.14 Parties to an Action

Any party to a court action (usually an injured party, a worker, the worker's employer, any other employer subject to the *Act*, or any employees or agents of the employer) may bring an application under s.29(1) of the *Act*, to determine if the right of action is barred.

3.20 How to Appeal

An appeal to the Tribunal may be started by filing a Notice of Appeal form or any other written notice that contains substantially all of the elements of the Tribunal's Notice of Appeal form. The Notice of Appeal form may be downloaded from the Tribunal's website at www.gov.ns.ca/wcat/ . The completed Notice of Appeal form or written letter of appeal may be delivered to the Tribunal by mail or fax.

Any notice of an appeal must:

- be made in writing or in another form acceptable to the Tribunal
- identify the hearing officer's decision being appealed and attach a copy of the decision
- state why the decision is incorrect and should be changed
- state the outcome requested
- be signed by the person making the appeal, or an authorized representative
- be copied to the other participants
- be received by the Tribunal within 30 days from the date notification of the hearing officer's decision is received, and
- indicate if the appeal is ready to proceed

Telephone notice of an intent to appeal is sufficient to meet the 30 day time limit. After phoning the Tribunal, a written notice of appeal must be filed as soon as possible. If written notice of the appeal is not filed, the appeal will be deemed to have been abandoned.

3.21 Extension of Time to File an Appeal

If the hearing officer's decision is mailed, receipt within 5 business days is assumed [s.189(1)]. If the 30-day time limit to appeal to the Tribunal is missed, a written request to the Registrar for an extension is necessary. The Registrar can extend the 30-day time limit when an injustice would result if the deadline is not extended [s.240(2)]. Requests must be made at the earliest opportunity and must include the reasons for missing the deadline. The request should also include any other supporting information and a completed Notice of Appeal form.

Persons entitled to participate in the appeal will be given an opportunity to respond to the request before the Registrar decides if the extension will be granted. The decision of the Registrar regarding the extension will be communicated in writing to the person who made the request and to those persons entitled to participate in the appeal. In determining whether an injustice would result if the time limit is not extended, the Registrar may consider many factors, including:

- evidence of an intention to appeal within the 30-day time limit
- the length of delay in filing the appeal
- prejudice to the person requesting the extension if it is not granted
- prejudice to other potential participants if the request is granted
- events which prevented the filing of the appeal within the 30-day limit (for example, delayed receipt of the hearing officer's decision)

3.30 Notice of Constitutional Questions or Charter Arguments

If an appeal raises a question about the constitutional validity or applicability of legislation, a regulation or a by-law, or a violation of the Canadian Charter of Rights and Freedoms, notice must be given to the Attorney General of Nova Scotia. [Section 10 of the *Constitutional Questions Act*, R.S.N.S., c.89, s.1(as amended)].

Notice to the Attorney General of Nova Scotia may de delivered to William Wilson, Q.C., Executive Director of Legal Services, Department of Justice (NS), 4th Floor, 5151 Terminal Road, Halifax, Nova Scotia, B3J 2L6.

If the challenge is to federal legislation, notice must also be given to the Attorney General of Canada. Notice to the Attorney General of Canada may be delivered to Michael Donovan, Q.C., Department of Justice (Canada), Duke Tower, 1400-5251 Duke Street, Halifax, Nova Scotia, B3J 1P3.

Notice must also be given to the other participants to the appeal and to the Tribunal as soon as possible. Notice can be given at the same time that notice of the appeal is filed with the Tribunal.

The Attorney General of Canada and the Attorney General of Nova Scotia are entitled to file evidence and make submissions to the Tribunal on the constitutional question or charter argument.

3.40 Application to Determine if a Right of Action Against an Employer is Barred

Section 29 of the *Act* allows any party to an action to apply to the Chief Appeal Commissioner to determine whether a right of action is barred by s.28(1) of the *Act*. The Section 29 Application form may be downloaded from the Tribunal's website at www.gov.ns.ca/wcat/. Applications must be made to the Chief Appeal Commissioner and should include the following:

- copies of all pleadings in the action and in any other action arising out of the same set of facts
- if not in the pleadings, a brief statement of the facts giving rise to the action
- the remedy or remedies sought (for example, a finding that the action is barred for one or more parties to the application)
- notice of any workers' compensation claim which is related to the cause of action
- information concerning whether a potential participant is an assessed employer under the *Act*
- a list of any potential respondents or participants in the application, including any representatives for the respondents or participants
- the residency of any potential participant to the application
- the trial date(s) for the action if known
- an indication as to how the application should proceed (either by way of oral hearing or by written submission)
- the likelihood of an agreed statement of facts; and
- the likelihood that legislation other than the *Act* may be considered in the application

Completion of the Tribunal's Section 29 Application form will generally satisfy the

requirements for initiating an application under s. 29 of the *Act*. The completed form or a written letter of application may be hand delivered to the Tribunal or sent by mail or by fax.

All documentation and information contained in the application should be provided to the Tribunal, the Board, and all potential participants (including a worker's employer). Parties other than those named in the application may assert that they have an interest in the application and may ask the Tribunal for a ruling on their participation. The Tribunal will determine if they have an interest which entitles them to participate. The Tribunal may also advise other interested parties of the application.

4.00 INTAKE AND PROCESSING OF APPEALS AND APPLICATIONS

4.10 Intake

The Registrar oversees the intake of new appeals and applications. They are screened for compliance with preliminary requirements and an appeal number is assigned. The Registrar may determine:

- if sufficient information has been provided to proceed with the appeal or application or whether additional information is required
- if, on the face of the appeal or application, it is within the Tribunal's jurisdiction
- whether an extension of time to appeal is required
- if another participant should be notified of the appeal or application
- the classification of the appeal or application for streaming purposes
- if there are security or accessibility concerns

4.20 Streaming : Regular, Specialty, or Self-Represented

The Registrar will determine if an appeal should be handled in the "regular", "specialty", or "self-represented" stream.

4.21 Regular Stream

For appeals in the regular stream, the Registrar will make a preliminary determination whether the appeal should proceed by written submission or oral hearing. Assignment to an appeal commissioner or a panel will usually occur when the deadline for providing written submissions and evidence has passed or when the oral hearing is scheduled.

4.22 Specialty Stream

Specialty appeals may be assigned to an appeal commissioner after the mode of hearing has been determined but prior to receipt of evidence and submissions, the scheduling of an oral hearing or consideration of most preliminary matters. Generally s.29 applications are handled in the specialty stream.

4.23 Criteria for Regular or Specialty Stream

In determining whether an appeal should be assigned to the regular or specialty stream, the Registrar may consider:

- the issues on appeal
- whether the issues are novel or unusual
- the complexity of the issues, facts and evidence
- the possibility of resolving the appeal by alternate means
- the number of participants and witnesses
- the necessity for a pre-hearing conference
- the estimated duration of the hearing
- the remedies sought
- the potential for a jurisdictional challenge
- the potential for a constitutional or charter challenge
- whether there are multiple appeals with common or similar subject matter
- whether the appeal raises a significant issue concerning the interpretation of the *Act* or Board policies
- whether the appeal raises a significant issue concerning the validity of a Board policy and
- the likelihood that legislation other than the *Workers' Compensation Act* would be considered in the appeal.

4.24 Self-Represented Participants

In cases where participants are self-represented and the appeal is proceeding by oral hearing, it is recommended that the self-represented participants review the Tribunal's "Guide to Oral Hearings". When appeals involving self-represented participants are proceeding by written submission, a review of the Tribunal's "Guide to Appeals Proceeding by Written Submission" is recommended. The guides are available on the Tribunal's website at: www.gov.ns.ca/wcat/.

The Tribunal will attempt to telephone self-represented participants prior to a hearing. The purpose of this telephone call is to discuss the appeal process and to set a date for the hearing, if one has not already been set. Telephone calls are documented and become part of the Tribunal's file. When the telephone call is made or received by an appeal commissioner, that appeal commissioner will not hear the appeal.

Shortly before a scheduled hearing, the Tribunal will attempt to telephone self-represented participants to remind them of the date, time and location of the hearing.

4.30 Mode of Hearing

The Registrar will determine whether the appeal or application proceeds by way of oral hearing or written submission. Factors the Registrar may consider include:

- whether there are significant factual issues to be resolved
- circumstances that may favour or hinder a participant's opportunity to present their case
- the request of one or more participants
- whether there was an oral hearing before the hearing officer whose decision is on appeal to the Tribunal
- whether there are issues of credibility to be considered
- the quantity and nature of the documentary evidence on file
- whether the appeal or application involves novel or complex issues of law or fact and
- whether the participants are represented

4.31 Objections to the Mode of Hearing

Participants may object to the mode of hearing selected by the Registrar and the Registrar

may reconsider and alter the mode of hearing. At any time, after the appeal has been assigned, the presiding appeal commissioner may determine that another mode of hearing is more appropriate and may also alter the mode of hearing.

4.32 Scheduling the Hearing

Once the mode of hearing has been determined, the Tribunal will notify participants regarding: the mode of hearing; scheduling a hearing; submissions and evidence deadlines; and preliminary matters or inquiries.

4.40 Employer Notice of Intention to Participate

For appeals dealing with compensation, participants may include the worker, the worker's employer, the Board and any other person who has a direct and immediate interest in the matter [s.245(1)].

A participant, such as the employer, who does not intend to take part in the appeal should notify the Tribunal as soon as possible. This ensures that information is only provided to participants who will be taking part in the appeal.

In a worker appeal, the worker's employer is advised when the Tribunal receives notice of an appeal. The employer must complete a "Notice of Intention to Participate" form if the employer wishes to participate. If the employer does not return a completed form by the date set by the Tribunal, the Tribunal proceeds under the assumption that the employer does not wish to participate in the appeal. If an employer indicates that they do not wish to participate or does not return a completed form, no further information or notices will be provided, except for a copy of the final decision.

Failure to notify the Tribunal of an intention to participate does not preclude subsequent participation. If, for example, the employer attended an oral hearing, the employer would have the right to be heard. However, the Tribunal will not notify the employer of the oral hearing date unless the employer has indicated an intention to participate.

The Notice of Intention to Participate form, which includes a Request for Access to Documents form, is available on the Tribunal's website at :www.gov.ns.ca/wcat/.

4.50 Employer Access to Documents

An employer may request copies of documents on file with the Tribunal. The Tribunal may: refuse to provide copies of the documents; edit copies of the documents; provide only relevant documents with specific restrictions on the employer's use of the documents; or make any other appropriate ruling regarding the disclosure of documents. There is a $25.00 fee charged to employers when they make an initial request for a copy of files or documents in the Tribunal's possession.

Prior to receiving copies of documents from the Tribunal, the employer must agree, in writing, not to use or disclose the documents for any purpose other than pursuing or responding to the appeal before the Tribunal. The Employer must also agree to keep the documents confidential and secure.

The Tribunal is required to comply with the *Freedom of Information and Protection of Privacy Act* ["FOIPOP"]. Disclosure of personal information is presumed by FOIPOP to be an unreasonable invasion of privacy if the personal information relates to medical, dental, psychiatric or psychological conditions. However, disclosure of personal information is not an unreasonable invasion of privacy if there is written consent to the disclosure. Otherwise, material can only be released to employers where it is necessary to ensure a fair hearing or where the issue on appeal is one in which the employer has a direct interest.

4.60 Representation

All participants before the Tribunal may be assisted by a representative of their choice. The Tribunal may communicate only with the representative and may not send copies of correspondence to both the representative and the represented participant.

Section 260 of the *Act* established the Workers' Advisers Program. This program provides free assistance, advice and representation to workers seeking compensation who meet the eligibility criteria [s.261]. Workers are also free to choose a representative that is not part of the Workers' Advisers Program [s. 271(1)].

If, at any point, the representative ceases to act, either the participant or the representative must advise the Tribunal in writing.

4.61 Duties of a Representative

This section is intended to provide guidance to representatives, by setting out minimum standards of behaviour the Tribunal expects of all representatives.

A representative must be prepared and should be familiar with the Board's claim or assessment file(s) and the Tribunal's rules, practices and procedures.

A representative must behave courteously and respectfully to all participants and the Tribunal during an oral hearing. Representatives should instruct their clients and witnesses on the requirement for courtesy during hearings and should take reasonable steps to dissuade clients and witnesses from disrupting a hearing.

An appeal commissioner(s) assigned to an appeal or application has the authority to control the proceeding to ensure that it is conducted in a manner that is respectful of all participants and the Tribunal, including Tribunal staff. A disruptive representative may be removed from the hearing room. A representative who is abusive to Tribunal staff may

have their access to staff restricted.

A representative must respect the confidentiality of information disclosed during Tribunal proceedings and not use that information for other purposes without the consent of the participants.

When not at a hearing or during a conference call, a representative who wishes to communicate with an appeal commissioner should do so through the Tribunal's staff. In all cases communications should be copied to all participants.

Following a Tribunal decision, a representative should not write to or otherwise contact the presiding appeal commissioner(s) concerning the decision. Any questions should be directed to the Chief Appeal Commissioner.

4.70 Appeal Readiness

The Tribunal requires the participant who has filed an appeal to notify the Tribunal when the appeal is ready to proceed. This allows the Tribunal to deal with appeals efficiently.

Notice of readiness may be given at the time the notice of appeal is filed. Subsequently, it may be given in writing or by calling the Registrar or Scheduling Coordinator (Halifax local calls: 424-2250; long distance calls: 1-800-274-8281). The Registrar may set initial submission deadlines which will be finalized when the Tribunal is notified that an appeal is ready to proceed.

If the appeal is not ready to proceed within 90 days of filing the appeal, the Tribunal must be notified of the reasons for the delay and be advised when the appeal will be ready to proceed. The Tribunal may provide additional time to give notice that an appeal is ready to proceed. The Tribunal's decision to extend the time to give notice may be based upon the following factors:

- evidence of intent to proceed with the appeal
- the length of delay expected
- prejudice to the person requesting the extension if it is not granted
- prejudice to other potential participants if the request is granted
- events which have prevented the participant from being ready to proceed (for example, an inability to secure medical evidence or an illness)

Only in exceptional circumstances will an extension beyond 180 days be granted. The Tribunal's decision to extend the readiness deadlines beyond 180 days will be based solely upon consideration of the potential prejudice to the participants.

If the appeal is not ready to proceed within 180 days of the date that the notice of appeal was received by the Tribunal, the Tribunal may, instead of extending its deadlines:

- set dates for the appeal to proceed and, if appropriate, change the mode of proceeding from oral hearing to written submissions
- seek submissions and consider referring the appeal back to the hearing officer under s. 251(1);or
- schedule a pre-hearing conference

All appeals should be resolved within one year from the date the Tribunal received the notice of appeal.

4.71 Postponements

Once an appeal is ready to proceed and has been set down by the Tribunal, it is anticipated that in all but exceptional circumstances the appeal will proceed as scheduled. If a participant cannot attend a scheduled hearing or meet submission and evidence deadlines, the participant must call or write the Tribunal immediately. Postponement requests should be made at the earliest opportunity and should include reasons for the request and the length of the postponement being sought.

When dealing with a postponement request, the Tribunal may consider a variety of factors including:

- the opportunity for a fair hearing without a postponement
- whether granting or denying the request would prejudice any participant
- any previous postponements
- whether the request is made at the earliest opportunity
- whether reasonable efforts were made to avoid the need for a postponement
- the amount of time available to prepare for the appeal

If the request relates to the unavailability of a witness on the date scheduled for the hearing, the Tribunal may also consider the reason the witness is unavailable, efforts made by the participant to have the witness available and the importance of the witness to the resolution of the appeal. If the request is made so that a participant can obtain representation, the Tribunal will also consider whether there was an unreasonable delay in seeking representation.

4.72 Possible Outcomes of a Postponement Request

The possible outcomes of a postponement request include:

- granting the request, and rescheduling the date for the hearing or setting new submission and evidence deadlines
- granting the request without new dates or deadlines
- denying the request, even if all participants have consented; or
- making any other appropriate order

If a postponement request is granted by an appeal commissioner(s) at a hearing, the Tribunal will ensure that all participants anticipated at the hearing are notified of the postponement.

4.80 Rights of Participants

All participants in an appeal or application before the Tribunal have the right to:

- receive notice that an appeal or application has been filed with the Tribunal
- make representations on the mode of hearing
- receive a copy of documents in the Tribunal's possession which are relevant to the appeal or application
- provide the Tribunal with written submissions and evidence
- receive copies of written submissions and evidence provided to the Tribunal by the other participants
- receive notice of the date, time and location of an oral hearing
- participate in the hearing by making oral submissions and bringing witnesses to testify at the hearing
- respond to the submissions and evidence presented by other participants
- receive a copy of the Tribunal's decision
- appeal the Tribunal's decision

5.00 DISPOSITION OF APPEALS OR APPLICATIONS

5.10 Preliminary Decisions

Preliminary decisions deal with procedures or issues in the processing of an appeal but do not directly determine the issues on appeal. Preliminary decisions may be rendered in a formal decision format under an assigned Tribunal number. If numbered, the decision is assigned the extension code "PAD". They may also be rendered by letter without an assigned appeal number. Preliminary decisions may be issued by the Registrar or the appeal commissioner(s) to whom the appeal has been assigned. Examples of issues dealt with in preliminary decisions include:

- extension or denial of the time limit within which to appeal to the Tribunal
- whether an issue is within the Tribunal's jurisdiction
- consolidating or joining appeals
- granting extensions or postponements for the filing of written submissions or the holding of oral hearings
- exclusion of witnesses
- relevancy of evidence
- issuing a summons to require a witness to attend a hearing
- exclusion of documents or other evidence
- orders to produce documents or evidence
- determination of the participants to an appeal
- how the appeal should proceed (written submissions or oral hearing)
- whether the appeal should be referred to the Chair of the Board of Directors [s.247(1)]
- whether an appeal raises the same issue(s) as an appeal postponed or adjourned under s.247 or s.248
- whether an interim award is appropriate while a matter is postponed or adjourned under s.247 or s.248

- whether expert advice should be sought [s.254]
- in s.29 applications, whether a Board claim file(s) should be considered part of the record before the Tribunal
- in s.29 applications, the admissibility of discovery transcripts and court documents
- in certain circumstances, whether an employer is an assessed employer under the *Act*

5.20 Appeal Decisions and Decisions under s.29 of the *Act*

An appeal decision is a final disposition of the issues on appeal from the hearing officer's decision. An appeal decision follows a standard format and is assigned an appeal number with the extension code "AD". A decision disposing of an application under s.29 of the *Act* is assigned a "TPA" extension code.

5.30 Referral Back to the Hearing Officer

A referral to the hearing officer under s.251(1) is assigned an "RTH" extension code.

The decision to refer a matter back is not a final ruling on the merits of the issues on appeal, but it ends the appeal before the Tribunal. However, a further appeal of the hearing officer's reconsideration decision receives priority to the other appeals that were started after the date of the referral back to the hearing officer [s.251(2)]. Referrals are made to the hearing officer who decided the issues on appeal to the Tribunal or to another hearing officer if necessary.

A decision which refers a matter back to the hearing officer may also dispose of one or more issues on appeal, in that case, the decision is assigned an "AD-RTH" extension code.

5.40 Postponement of Appeals

Generally appeals before the Tribunal are not postponed in anticipation of legislative changes, Board decisions or decisions from the Nova Scotia Court of Appeal. However, a participant in an appeal may request that an appeal be postponed. The Tribunal will determine whether or not to grant the postponement in the circumstances.

5.41 Referral to the Chair of the Board of Directors

When the Tribunal believes that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors, the appeal is postponed or adjourned while the appeal is referred to the Chair [s.247(1)].

All appeals before the Tribunal that raise the same issue or issues will be postponed or adjourned pursuant to s.247(3). Participants will be advised in writing of the decision of the Tribunal to stay their appeal. Appeals that have been postponed or adjourned will not be adjourned for more than 3 months in most cases. In exceptional circumstances the postponement or adjournment could last up to 12 months [s. 250]. The Tribunal may make an interim award while the matter is postponed or adjoumed [s.247(4)].

Where the Chair of the Board of Directors is of the opinion that an appeal raises an issue of law and general policy that should be reviewed pursuant to s.183 of the *Act*, the Chair may postpone or adjourn an appeal before the Tribunal and direct that it be reviewed by the Board of Directors. All appeals that raise the same issue or issues are postponed or adjourned. The postponement or adjournment should not last longer than 12 months and ends the day the Board issues a policy or notifies the Tribunal that the Board will not be issuing a policy [s.250].

5.50 Deadlines for Issuing Decisions

There are no deadlines for rendering preliminary decisions. The Tribunal has 60 days to issue an appeal decision [s.246(3)].The time period for issuing an appeal decision or a referral to the hearing officer begins upon completion of an oral hearing or the date on which all submissions have been received by the Tribunal. The deadline may be extended in exceptional circumstances by virtue of s.240(2), if, in the opinion of the Tribunal, an injustice would result if the decision were rendered within 60 days.

5.60 Contents of Decisions

Section 252A requires the Tribunal to issue a decision that clearly states the determination of the Tribunal and the reasons for the determination. The reasons are to be stated as briefly as possible without undue elaboration.

5.61 Decision Outcomes

In deciding an appeal, the Tribunal may confirm, vary or reverse the decision of the hearing officer s.252(1)].The Tribunal's decisions do not use these terms but the terms "allowed", "allowed -in-part", and "denied" correspond to the statutory terms as follows:

Denied: On every issue addressed in the decision, the Tribunal agreed with the determinations made by the hearing officer, though not necessarily with the reasons for the determination. In essence, the hearing officer's decision was confirmed.

Allowed-in-part: On one or more issues addressed in the decision, the Tribunal has reached a conclusion which differed from the hearing officer's determination, with the result that the hearing officer's decision is

varied. However, the participant bringing the appeal was not granted the exact relief sought.

Allowed: The Tribunal disagreed with the determinations made by the hearing officer on the issue(s) appealed to the Tribunal. The hearing officer's decision was reversed and the participant bringing the appeal was granted the specific relief sought.

5.70 Correcting Decisions

The Tribunal may, upon the request of a participant, or on its own initiative, issue a decision to correct a typographical or clerical error contained in a decision already released by the Tribunal [s. 252(3)]. This may be done where the text of the decision does not accurately reflect the intent of the decision-maker(s). However, a correcting decision cannot be used to reconsider a decision. The correction will be issued in a standard format referred to as a correcting decision, with a "COR" extension code.

5.80 Withdrawals

A participant who has appealed to the Tribunal may withdraw the appeal at any time before the appeal is decided.

6.00 DECISION - MAKING PROCESS

6.10 Panels

Appeals or applications to the Tribunal may be determined by one appeal commissioner or by a panel of three. Panels are designated by the Chief Appeal Commissioner. One member of a panel is designated panel chair. Participants have no input into the composition of a panel. Prior to the hearing of an appeal, if a panel member is unable to continue, the member may be replaced by another appeal commissioner at the discretion of the Chief Appeal Commissioner.

6.20 Joining Related Appeals

Two or more appeals may be joined together where the Tribunal has before it multiple appeals involving the same general issue(s). Appeals may be joined if it would assist in resolving them in a cost-effective, timely and consistent manner.

If the appeals proceed by oral hearing, common issues raised by all of the appeals may be dealt with in one hearing. The appeal commissioner(s) assigned to hear the appeals may take steps to ensure a fair hearing and to protect the privacy of information particular to the individual appeals.

Depending on the circumstances, the Tribunal will:

- issue a generic decision addressing all the joined appeals
- issue a generic decision dealing with the common issue(s) raised by the joined appeals, together with individualized decisions for each particular appeal; or
- issue an individual decision on each appeal, taking into account common issues, evidence and submissions

6.21 Consolidated Appeals

The Registrar may consolidate two or more active appeals for the same participant into one appeal. This may be done where one participant has multiple appeals arising from the same claim file, injury or related injuries. A decision to consolidate appeals can be made at the request of the participant or by the Registrar with the consent of the participant, where the Registrar believes it would be efficient and fair to do so.

6.30 Pre-Hearing Conferences

The Tribunal may require participants to attend or participate in a pre-hearing conference to discuss procedural and substantive issues relating to the conduct of the appeal. A pre-hearing conference may concern any or all of the following:

- identification of the issues
- determination of what additional evidence, including any new medical or other expert evidence, is required, and timeframes for the production of any such evidence
- procedural issues, such as whether an oral hearing will be convened and, if so, when and for how long the hearing should be scheduled
- exploration of settlement of some or all issues on appeal

The Registrar, or the appeal commissioner(s) assigned to the appeal, will decide if a pre-hearing conference should be held and will notify the participants. The conference may be conducted over the phone. Pre-hearing conferences are generally not recorded.

6.40 Expert Evidence

If a participant intends to file new expert evidence the Tribunal should be notified as soon as possible. Generally speaking, expert evidence is defined as opinion evidence given by a person whom the Tribunal finds to be an expert, based on their training or qualifications.

This can include a physician, a scientist, a physiotherapist, an accountant or any other person with expertise in a particular area. The Tribunal's rules concerning expert evidence apply to evidence received in oral hearings, as well as appeals proceeding by written submission. Generally, the following rules apply:

- expert opinion evidence will generally only be accepted as expert evidence if it is from a person the Tribunal recognizes as being qualified by education, training or experience

- objections to a person's qualifications as an expert will not generally cause the appeal commissioner(s) to exclude the evidence. Objections will be considered in weighing the evidence received

- if it is anticipated that the expert witness will attend a hearing, a written report outlining the evidence that will be addressed at the hearing must be filed in advance of the hearing

- the qualifications of the expert should be included with the expert's report

- written reports from expert witnesses should be provided to the Tribunal and the other participants as soon as they are received and no later than the deadline set by the presiding appeal commissioner(s)

- when a previously undisclosed expert's report is received at an oral hearing, the Tribunal may determine what steps are necessary to ensure that the other participants are given an adequate opportunity to respond. The Tribunal may allow an extension of time after the oral hearing for submission of a response; postpone the oral hearing; or take whatever steps the Tribunal considers appropriate

- the Tribunal will not require an expert to attend an oral hearing unless the Tribunal believes the expert's attendance is necessary for a fair hearing of the issues or that a failure to attend the hearing would prejudice a participant to the proceeding

The Tribunal may request a person having professional, technical or other knowledge to assist them in respect of any matter before it. If the Tribunal receives such assistance, it will not rely upon any new evidence provided by the expert without notifying the participants and providing them with an opportunity to respond to the evidence.

6.50 Summons and Orders for Production

Section 178(1) of the *Act* confers on any member of the Tribunal, the powers, privileges and immunities of a commissioner appointed pursuant to the *Public Inquiries Act*. These include the authority to:

- summon witnesses and require them to give oral or written evidence on oath or

affirmation

- require the production of any document or thing the Tribunal considers necessary for the full investigation and consideration of any matter

- accept oral or written evidence, unless the evidence is inadmissible by any statute or is inadmissible in a court by reason of any privilege under the law of evidence; and

- punish persons guilty of contempt

If any participant believes that a person with relevant evidence will refuse to attend an oral hearing or requires a summons to get time off work, the participant may ask the Tribunal to issue a summons, also known as a subpoena. A participant who has attempted to obtain relevant documentary or other evidence but has been unable to do so, may ask the Tribunal to issue an "order for production". Also, the Tribunal may issue a summons or an order for production on its own initiative. Summons and orders for production may be issued together or separately.

A request for a summons or an order for production may be made using a form found on the Tribunal's website at: www.gov.ns.ca/wcat/. The summons or order for production may be drafted by the Tribunal if necessary, signed by an appeal commissioner(s) and forwarded to the requesting participants for service.

Where an oral hearing is to be held, and a participant believes a summons is required to compel a witness to testify at the hearing, a written request should be made to the Tribunal, at least 10 days before the date of the hearing. An order for production of documents or other evidence can be issued for appeals proceeding by oral hearing or written submission.

The Tribunal may provide reasonable traveling and living expenses to any person summoned as a witness [s. 178,s.179]. The Tribunal will not provide expenses to anyone other than a witness summoned by the Tribunal on its own initiative.

6.51 Criteria for Issuing Summons and Orders for Production

The Tribunal's decision to issue a summons or an order for production is based on the facts and circumstances of the particular appeal. Considerations usually taken into account in deciding whether to grant such requests include:

- whether the evidence being sought is likely to be relevant, in other words, it would tend to prove or disprove a matter at issue in the appeal

- whether the person to whom the summons or order for production is directed has access to, or control of, information or documents relevant to the appeal

- whether there are other means to obtain the same evidence
- whether the evidence sought is "compellable", in other words, whether it is protected from disclosure by statute or by reason of any privilege under the law of evidence
- whether it would be oppressive or an abuse of power to issue the summons or order for production

If a witness is willing to attend a hearing but needs a summons in order to get time off work or to prevent some other hardship, the Tribunal will issue the summons on request.

6.52 Contempt

A person named in a summons or order for production may request that it be cancelled or varied. The request, along with reasons supporting the request, should be made in writing to the Tribunal as soon as possible. If a person fails to comply with a summons or an order for production, they may be found guilty of contempt and subject to punishment in accordance with s. 178 of the *Workers' Compensation Act* and s. 5 of the *Public Inquiries Act*.

7.00 ORAL HEARINGS

7.10 General

If an appeal proceeds by oral hearing, there is an opportunity for all participants to appear before an appeal commissioner(s) to present oral evidence and make oral arguments. It is not necessary to file written submissions. An oral hearing may be conducted with the participants present or, in unusual cases, by means of teleconference or video conference facilities.

Prior to the hearing, the Tribunal will send a letter confirming the time, date and place of the hearing. Hearings are held in various locations around the province. The Tribunal will attempt to schedule a hearing close to the community where the participant bringing the appeal resides.

The participant who has begun the appeal should always attend the hearing. Any participant may bring a companion for support. Any participant may be accompanied by a representative of their choosing.

7.20 Evidence at Oral Hearings

Any person giving evidence at the hearing is referred to as a witness. Any participant may bring a witness(s) to give evidence at the hearing. Participants are responsible for advising

their witnesses of the date, place and time of the hearing. The Tribunal should be notified prior to the hearing if a witness is to attend.

If special equipment such as a VCR is required at a hearing, arrangements must be made in advance.

New medical reports or other evidence should be sent to the Tribunal and to the other participants at least two weeks before the hearing, or within the deadline set by the Registrar or presiding appeal commissioner(s). The Tribunal will have a copy of the Board's claim file(s). However, if there is any additional evidence that the Tribunal should consider, it is the responsibility of the participants to provide copies to the Tribunal and to the other participants.

Delays may result if evidence is not received before the hearing or within the relevant deadlines.

7.30 Procedure at the Hearing

The procedures to be followed in an oral hearing may vary, depending on the circumstances of a particular case, but in every case, the appeal commissioner or panel will greet the participants and explain the hearing procedure. The explanation usually includes:

- an introduction of the appeal commissioner(s)
- an explanation of the role of the Tribunal
- a request to other persons in attendance to introduce themselves and explain their role in the hearing
- identification of the decision under appeal and a clarification of the precise issues under appeal

Usually the participant who has appealed, or their representative, is the first to begin each stage of the hearing. A participant may, but is not required to, make an opening statement. Following opening statements, the Tribunal usually receives evidence from the participants and their witnesses. All witnesses will be required to confirm that the evidence given to the Tribunal is the truth. Witnesses may be questioned by the other participants and also by the appeal commissioner(s). The participants may summarize their case at the end of the hearing and may wish to reference the *Act,* relevant policies or prior Tribunal decisions.

At the close of the hearing, the appeal commissioner(s) will advise the participants regarding any post-hearing submissions or evidence which is outstanding. They will also advise the participants when a decision in the appeal is expected to be rendered.

Where it appears that the time scheduled for an oral hearing is insufficient, and it is not possible to continue the hearing to completion on that date, the Tribunal may adjourn the hearing and continue it at a later date.

7.31 Privacy

Oral hearings are confidential and are not open to the public. However, the Tribunal has the discretion to permit attendance by members of the public, including the media, with the consent of all participants. Also, observers, such as family members, friends, or trainees are generally allowed to attend with the consent of the participants and the Tribunal. Observers must be identified at the outset of the hearing and are not expected to participate in the hearing.

7.32 Security

The Tribunal may arrange for security at a hearing.

7.33 Recordings

All hearings before the Tribunal must be recorded by the Tribunal [s.253(1)]. The Tribunal's recordings must be kept for a period of two years after the expiry of the appeal period (30 days from the date of the Tribunal's decision). Every participant is entitled, at their own expense, to a transcript of the recorded proceedings [s.253(2)].

Participants are not permitted to use their own equipment to record the Tribunal's proceedings.

7.34 Costs

Participants at the hearing will not be reimbursed for costs connected with the hearing, such as travel expenses, unless they were summoned by the Tribunal as a witness, under s. 178 of the *Act*.

7.35 Post-Hearing Submissions and Evidence

Occasionally, a participant requests or is asked to provide additional evidence or submissions after the hearing. In that case, a time frame for the submission of the additional evidence or submissions will be set by the appeal commissioner(s).

If the Tribunal receives any additional evidence or submissions following a hearing, it must be disclosed to all participants who attended the oral hearing. Generally, they will have an opportunity to respond. If the Tribunal obtains further evidence on its own initiative, it will be disclosed to the participants. The appeal commissioner(s) will determine the procedure and time frame for obtaining submissions.

When the hearing has been completed and the Tribunal has received all post-hearing evidence and submissions, a written decision will be mailed to all statutory participants within 60 days.

7.40 Representation at the Hearing

All participants have the right to attend and to be represented at a hearing. A representative may or may not be a lawyer. When there is more than one person attending a hearing on behalf of a participant, the appeal commissioner(s) should ascertain which person is acting as a representative. When the employer is a limited company, one person may be designated as a representative and one as the employer.

7.50 Interpreters

The Tribunal provides independent interpreters when required. The Tribunal should be notified of the need for an interpreter when an oral hearing is requested. Friends or relatives are generally not permitted to act as interpreters, although the Tribunal has the discretion to allow this in appropriate circumstances. For example, such an interpreter may be acceptable where the participant needs assistance with only a few words. If it is apparent to the appeal commissioner that an interpreter is necessary and none is present, the hearing should be rescheduled. Interpreters are normally affirmed or sworn in at the start of the hearing.

7.60 Witnesses

Generally witnesses are excluded from a hearing until called to testify in order to reduce the likelihood of their evidence being influenced, either intentionally or inadvertently, by hearing the evidence of other witnesses. In deciding whether to exclude a witness, the appeal commissioner(s) may consider, among other things: whether there is an actual risk a witness may be influenced; whether the witness' evidence is likely to be contentious; and whether there are good grounds to allow the witness to remain in attendance.

The Tribunal has the discretion to hear evidence from persons who were originally identified as observers or representatives. If the person was present in the hearing while another witness(es) gave evidence, this fact may be taken into account by the Tribunal in determining the weight to be given to the evidence subsequently provided by that person.

If any person, including the worker, employer or their representative, attends the hearing as an observer, the Tribunal may require them to become a witness to answer questions.

7.70 Site Visit

The appeal commissioner(s) may conclude that a site visit is necessary either prior to, or during a hearing. Participants who attend, or plan to attend, the hearing, and their

representatives, will be invited to attend the site visit. The appeal commissioner(s) may receive comments and submissions from the participants during the site visit, or may reconvene to a hearing room to receive submissions concerning the relevance or significance of the matters observed during the site visit.

7.80 Failure to Attend a Hearing

A participant, with notice of a hearing, who fails to attend the hearing is deemed to have waived the right to receive and respond to any evidence or submissions presented at the hearing or received by the Tribunal after the hearing. However, the Tribunal may exercise its discretion to seek post-hearing submissions from a participant who did not attend the hearing if necessary to resolve the appeal. If a participant chooses not to attend the hearing, another participant may ask the Tribunal to request their attendance.

A hearing will generally not proceed in the absence of the participant who has brought the appeal, unless there has been agreement to do so, in advance of the hearing. However, the appeal commissioner(s) has the discretion to proceed in the absence of the participant bringing the appeal.

Where a participant has filed a Notice of Participation with the Tribunal but is not present at the time scheduled for the hearing, the Tribunal may:

- proceed without the participant
- consider whether the participant should be given the opportunity to review the recording of the hearing and file post-hearing submissions and evidence; or
- consider whether the hearing should be rescheduled

7.90 Scheduling

The scheduling of oral hearings for self-represented participants, appeals with representatives not part of the Workers' Advisers Program and appeals in the specialty stream is generally done by telephone conference. The purpose of the conference call may include:

- determining the number of witnesses who may attend the hearing
- determining the length of time needed to hear the appeal
- determining if special equipment or facilities are required
- setting evidence and pre-hearing submission deadlines
- determining if any summons or orders for production may be required; and

! setting a date for the hearing

Oral hearings before the Tribunal involving a representative from the Workers' Advisers Program are generally scheduled at monthly "docket days". They may also be scheduled at other times by calling the Registrar or Scheduling Coordinator (Halifax local calls: 424-2250; long distance calls: 1-800-274-8281).

In Halifax, docket day is a meeting between workers' advisers and the Registrar where appeals may be scheduled. The workers' advisers are given a list of their unscheduled appeals at least one week prior to docket day. They come prepared to set dates for those appeals that are ready to proceed. In Sydney, the same process is followed except that the meeting is done by conference call rather than in person.

The scheduled date for a hearing should be adhered to. There are many factors considered in the initial scheduling of a hearing that may not be considered if an adjournment of the initial date is requested. They include: convenience to the participants; representative's schedules; vacations, the Tribunal's availability and the need to wait for outstanding evidence.

8.00 APPEALS PROCEEDING BY WRITTEN SUBMISSION

The Tribunal proceeds by written submission when it believes that the issue(s) under appeal can be resolved by receiving written evidence and arguments. Evidence may include, amongst other things, documents such as medical reports and sworn written statements given by a participant or witness. Submissions are written arguments to the Tribunal in support of a participant's position.

The Tribunal will advise the participants in writing that the appeal will proceed by written submission. A participant bringing the appeal must file submissions and evidence first. Other participants usually have three weeks to file a response.

When written submissions are complete, the appeal is usually assigned to an appeal commissioner(s) for a decision. Submissions are considered complete when all submission deadlines have passed or when submissions have been received from all participants. If no submissions are provided to the Tribunal, the Tribunal will consider the appeal on the basis of the Notice of Appeal and other available documents.

Participants should provide any additional evidence, such as medical reports or witness statements, at or before the time they provide written submissions to the Tribunal. This allows the other participants an opportunity to respond to the additional evidence. If a participant obtains additional evidence after the deadline has passed, but before the Tribunal's decision has been issued, the participant should contact the Tribunal immediately. If a decision has not been issued, the Tribunal may consider the late evidence and provide the other participants with an opportunity to make submissions on the late evidence. This may delay the Tribunal's decision.

A written decision will be mailed to all statutory participants within 60 days of the deadline for submissions or the date on which all submissions have been received by the Tribunal.

9.00 PUBLICATION OF TRIBUNAL DECISIONS

9.10 General

Tribunal decisions include a cover page setting out the names of participants and representatives. This information is not found in the body of the decision. The Tribunal endeavours to exclude any information from the body of a decision which could identify the participants. Decisions, without identifying features, are available through the Nova Scotia Department of Environment and Labour website. The database is developed and maintained by the Nova Scotia Environment and Labour Library. Anyone wishing to use the database should contact the Environment and Labour Library at 424-8474.

9.20 Personal Identifiers in Decisions

Generally, decisions are written without personal identifiers for participants, except on the cover page. The names of participants, lay witnesses and others (where the use of names would tend to identify the participants), are not used in Tribunal decisions. Witnesses may be identified by their role, for example, the "worker" or the "employer", or by initials.

Expert witnesses may be referred to by name. However, if an appeal commissioner considers that the use of an expert's name might identify the participant, the expert witness may be referred to by title, for example, the worker's attending physician, or by initials.

The names of representatives will generally not be used in the body of a decision. Instead, they may be referred to by their role, such as the worker's representative. Board claim file numbers or employer registration numbers are not included in the body of a decision.

Quotations contained within Tribunal decisions are edited to protect privacy. This will normally be accomplished by substituting a descriptive term for a name, and using square brackets to show the change, e.g., [the Worker].

10.00 COSTS AND EXPENSES

The Tribunal does not have the authority to award costs under the *Act*.

11.00 EVIDENCE

11.10 General

The Tribunal may admit any evidence, including hearsay, that it considers relevant to the appeal, whether or not a court would admit the same evidence. This may include any oral

testimony, documents or demonstrative evidence. However, the Tribunal may exclude any evidence that is repetitious, vexatious or inadmissible. The rules of evidence under which the Tribunal functions are more relaxed than those which apply to courts.

11.20 Internet Evidence

Relevant internet evidence, in the form of a printed document(s), may be admitted if the source is identified.

11.30 Generic Evidence

The Tribunal may consider generic evidence obtained in relation to other appeals previously or currently before the Tribunal.

11.40 Disclosure

At any time the Tribunal may order a participant to provide other participants or the Tribunal with information or documents that the Tribunal considers necessary to resolve the appeal. The information may include "particulars" clarifying the grounds for the appeal and the remedies requested.

11.50 The Record

All participants to an appeal before the Tribunal are entitled to a full copy of the "record". Generally, the record is all evidence and submissions (both oral and written) filed directly with the Tribunal, as well as all relevant Board claim files. Draft decisions and all notes made by an appeal commissioner(s) in reviewing the evidence do not form part of the record.

The Board is responsible for providing a copy of relevant claim files to workers. The Tribunal is responsible for providing copies of relevant claim files to employers and other participants.